In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1039

VAN NORMAN INDUSTRIES, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner manufactures radio antennae designed to be attached to automobile car bodies (Pet. 17b). With respect to sales made between October 1, 1955, and December 31, 1958, petitioner neither collected the 8 percent excise tax imposed upon sales by a manufacturer of automobile "parts and accessories" by Section 4061(b) of the Internal Revenue Code nor passed it on, but later (in 1958–1959), petitioner paid a total of $132,158.25 to the District Director of Internal Revenue (Pet. 32b–35b) and then brought this refund action in the United States Court of Claims. The court held that the radio antennae were "parts and accessories" within the meaning of Section 4061(b)

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and hence that no part of the taxes paid was refundable (Pet. 1b–14b).

The decision below is correct, and there is no basis for further review. So saying, we stress that the question involved in this case is of diminishing importance in the administration of the excise tax laws due to removal of the excise tax on automobile parts or accessories by Section 201(b)(2) of the Excise Tax Reduction Act of 1965, P.L. 89–44, 79 Stat. 136, effective as to all sales on or after January 1, 1966. Currently, the definition of automobile "parts or accessories" is material only as to sales made prior to that date and to sales of parts or accessories for trucks, buses, and trailers, which continue to be taxed (see Section 4061(b)(1) of the Internal Revenue Code of 1954, as amended).

1. The Court of Claims applied the standard of *Universal Battery Co.* v. *United States,* 281 U.S. 580, 584, that "articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles." The Court of Claims' formulation that any article designed for attachment or connection to an automobile is taxable absent a showing that "the primary function of the article is to serve a purpose unrelated to the vehicle as such" (Pet. 8b) is, plainly, a paraphrase of the *Universal Battery* test. Adopting the detailed findings of its trial commissioner (Pet. 14b), the Court of Claims found that automobile radio antennae require special qualities for effective functioning in an automotive environment and that petitioner's antennae were, in fact, specifically designed for mounting outside of

automobiles (Pet. 19b–20b). These undisputed basic findings amply warranted the conclusion that petitioner's antennae were "primarily adapted" for use in automobiles, especially since there was no evidence that petitioner had ever sold its automobile radio antennae save for use in automobiles (Pet. 27b).

Petitioner advances the novel suggestion that articles connected to, specially designed for, and having no use other than with respect to, automobiles must yet escape classification as "parts or accessories" unless they serve an automotive function, *i.e.*, add to the utility of automobiles as movable vehicles. Nothing in this Court's *Universal Battery* opinion, *supra,* supports so restrictive a standard, and the Treasury Regulations, substantially unchanged since *Universal Battery,* include in "parts or accessories" any article whose primary use is "in connection with" an automobile "whether or not essential to its operation or use." Treasury Regulations 46 (1940 ed.), Section 316.55. Consistent with this administrative construction of the statute, numerous articles have been held to be "parts or accessories" despite their lack of utility to an automobile as a movable vehicle. See, *e.g., Massao Hirasuna* v. *McKenney,* 135 F. Supp. 897, 900 (D. Hawaii), affirmed, 245 F. 2d 98 (C.A. 9) (automobile seat covers); *Aran* v. *United States,* 259 F. 2d 757, 759 (C.A. 9), certiorari denied, 358 U.S. 866 (baby bottle warmers plugged into cigarette-lighter outlets); *Masterbilt Products Corp.* v. *United States,* 42 F. Supp. 294 (Ct. Cl.) (dispenser of lighted cigarettes attached to automobile steering posts).

2. The Court of Claims suggested that the decision in *Smith* v. *McDonald*, 214 F. 2d 920 (C.A. 3), albeit not in conflict with the Court of Claims' decision in the present case, may have been decided erroneously (Pet. 12b–13b).[1] In that case the Third Circuit, in the course of holding that electric signs attached to taxicab roofs were not automobile "parts or accessories," reasoned that taxi signs were analogous to taxi meters or automobile radios, both of which added to the "utility" of automobiles yet were specifically excluded from the "parts or accessories" tax. As the Court of Claims correctly observed, however, since Congress removed automobile radios from the classification of automobile parts and accessories, only to tax them at a higher rate as radios, it would be improper to infer a legislative intention to exempt from tax completely any related articles (like car radio antennae) which fall within the general category of parts or accessories and have not themselves been specifically exempted.[2]

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[1] Petitioner also seems to contend (Pet. 5) that the Court of Claims questioned the decision in *King Trailer Co.* v. *United States*, 228 F. Supp. 1013 (S.D. Calif.), affirmed, 350 F. 2d 947 (C.A. 9). That contention has no basis in fact (Pet. 12b). Moreover, the Internal Revenue Service has accepted the holding in the *King Trailer Co.* case. See Rev. Rul. 66–163, 1966–1 Cum. Bull. 252, and Rev. Rul. 66–164, 1966–1 Cum. Bull. 253 (Pet. 1c–2c).

[2] The Internal Revenue Service has accepted the result in *Smith* v. *McDonald*, although not its reasoning. See Rev. Rul. 66–165, 1966–1 Cum. Bull. 253 (Pet. 3c). Signs affixed for the special and unusual purpose of advertising the business carried on by the owner of a vehicle may be distinguished from articles commonly attached to an automobile for the convenience, comfort or pleasure of the operator—and so within the common

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

GILBERT E. ANDREWS,
DONALD A. STATLAND,
Attorneys.

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notion of a part or accessory—such as automobile radio antennae, which were ruled to be "parts or accessories" before the instant controversy arose. See Rev. Rul. 56–698, 1956–2 Cum. Bull. 801.

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